

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID H. NEELEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>CHAMNESS TECHNOLOGY, INC.</b>	)	
Respondent	)	Docket No. 1,021,754
	)	
AND	)	
	)	
<b>FIDELITY &amp; GUARANTY INS.</b>	)	
<b>ZURICH AMERICAN INS. CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and its insurance carriers (respondent) request review of the August 7, 2007 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

The Administrative Law Judge (ALJ) entered an Order granting claimant's request for cervical surgery, at respondent's expense. Unfortunately, the Order contains no express finding that claimant's need for treatment is causally related to the underlying work-related injury.

The respondent requests review of this decision. Respondent contends that the "claimant's cervical symptoms appeared several months after his lumbar surgery and claimant has not met his burden of proof that his cervical symptomatology and condition are casually related to his lumbar injury."<sup>1</sup> Respondent therefore argues that the ALJ's order should be reversed.

Claimant argues that first there is no jurisdiction for respondent's appeal of the ALJ's August 7, 2007 order. Alternatively, claimant argues that the ALJ correctly concluded (at

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<sup>1</sup> Respondent's Brief at 1-2 (filed Aug. 31, 2007).

an October 13, 2006 preliminary hearing) that claimant's cervical complaints were causally connected to his work-related accident. And because that preliminary hearing Order was not appealed, that finding is *res judicata*. Thus, the ALJ's Order granting claimant cervical treatment in the form of surgery, which was the only issue presented at the August 3, 2007 preliminary hearing, should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

In order to understand the parties' arguments, a brief summary of the claim is necessary. Claimant sustained an injury to his low back which ultimately required surgery in December 2005. Immediately after surgery claimant alleges he had problems with numbness and tingling in his left foot, a problem that the physician indicated would likely go away with time.

Claimant's problems with numbness and tingling continued and according to him, he also immediately noticed problems in his cervical area and upper extremities, problems that were not documented by his treating physician. The records indicate that the first notation of neck and upper extremity problems occurred in April 2006.

On October 13, 2006, a preliminary hearing was held and claimant sought additional treatment to his neck and upper extremities based upon the report authored by Dr. Stein. Dr. Stein had evaluated claimant and opined:

I am not certain of the etiology in regard to Mr. Neeley's left upper extremity symptoms. Cervical nerve root irritation and/or peripheral nerve compression could have been a result of positioning at the time of surgery. If that is the case, these symptoms would be causally related to the original injury for which surgery was done. Further investigation is recommended in the form of cervical MRI scan as well as EMG/NCT of the left upper extremity. Treatment recommendations, if any, would follow.<sup>2</sup>

During the course of the preliminary hearing, the following colloquy occurred:

MS. FOERSTER: . . . Dr. Stein's report indicates and he states that the cervical nerve root irritation and/or peripheral nerve compression could have been a result of positioning at the time of surgery. If that's the case, these symptoms would be causally related to the original injury, for which surgery was done.

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<sup>2</sup> P.H. Trans. (Oct. 13, 2006), Ex. 1 at 3-4 (Dr. Stein's May 19, 2006 Report).

We think that's a strong enough statement that we have met our burden of proof to show that it's work related. Dr. Stein didn't find any other reason for that cervical problem to develop . . .

. . .

MR. WELTZ: . . . Furthermore, the Stein report basically gives a very weak opinion as to causation. It says it could be due to his positioning during the surgery. It doesn't say anything definite that this was related to the original injury; and when you couple that very weak opinion as to causation with the medical reports that don't show any kind of progression towards the symptoms that the claimant is complaining of today, that's respondent's basis for denying . . . and just rely on the treatment that has already been provided.

THE COURT: Well, after reviewing all the medical reports, I would agree he's not real clear what the cause is, but until the testing is done, there's no way for them to know for sure. It is clear that if the claimant has peripheral neuropathy that is not related. So any treatment for that would be denied.

But as for the testing and then whatever treatment, we're going to have to get the testing first in order to know what all is related and what's not related; and it's not uncommon for someone to have back surgery, progress real well and end up having more problems.

So I'm going to order the medical treatment and testing as recommended by Dr. Stein and Dr. Baig.<sup>3</sup>

Thereafter, the testing was performed and claimant was diagnosed with a C7 radiculopathy. Dr. Stein recommended epidural injections and physical therapy with traction. Dr. Stein was hoping to avoid surgery, but it is apparently now undisputed that he requires surgery to address his cervical complaints. And the medical evidence also makes it clear that the cervical surgery should be done first, before any further surgeries are done on the low back, as are contemplated.

Respondent was unwilling to provide the suggested cervical surgery contending claimant's cervical and upper extremity complaints were not documented and did not emerge until April 2006, months after the surgery.

No doubt in response to respondent's unwillingness to provide the surgery, claimant's attorney wrote to Dr. Stein. She explained that claimant had been given a walker after his low back surgery and that claimant had mentioned his upper extremity and cervical problems to the doctor. She also explained that claimant had not worked since his surgery and there had been no other incidents or injuries and asked whether this would

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<sup>3</sup> *Id.* at 20-22.

assist him in opining as to the connection between claimant's upper extremity and neck complaints and his original injury. In response, Dr. Stein stated the following:

The medical records that I have reviewed up to this point do not show any indication of left upper extremity symptomatology until the visit with Dr. Baig on 4/5/06, five months after surgery. This was the basis for my statement on 11/16/06 that the positioning on the operating table might have been causally related to the left upper extremity symptoms but that I could not make such a statement with any reasonable degree of medical probability and certainty. *However, if Mr. Neeley's statements that the onset of these symptoms was within 1-2 weeks of his back surgery are accepted, the situation is altered. With that proximity of onset to the back surgery, I would state within a reasonable degree of medical probability and certainty that there is a causal relationship of the cervical disk herniation with the lower back surgery.*

Positioning for lumbar surgery usually does not result in injury. However, the patient is in a specific position for an extended period of time while unconscious. One of the complications of this situation can be injury to the cervical spine and to the disks. The additional strain of using a walker could result in a disk protrusion in the cervical spine which would cause the left upper extremity symptoms of which this patient complains.<sup>4</sup>

On January 29, 2007 Dr. Stein met with attorneys for both sides and acknowledged-

. . . There is a mechanism for potential injury to the cervical spine at a lower back surgery because of positioning. This does not happen very often but is possible, particularly if there is a weak cervical disk with a propensity to herniate. If this becomes symptomatic within a week or two of the surgery, it is appropriate, within a reasonable degree of medical probability, to state that it is more likely than not that there was a causal relationship. If the neck symptomatology has its onset several months after the back surgery, it is no longer more likely than not there is a causal relationship and, in fact, the opposite would be the case.<sup>5</sup>

On May 4, 2007, Dr. Stein was again asked to speak to causation. He stated:

. . . I have reviewed the office notes of 12/16/05 & 12/30/05 of Dr. Mirza Baig subsequent to the 12/01/05 surgery on the lower back. There is no mention of upper extremity symptomatology in either of these visits.

I have reviewed all of my office chart on Mr. Neeley. I have found no basis to alter my opinion that cervical disk protrusion with nerve root irritation whose onset is noted within a relatively short period of time after lumbar surgery may reasonably

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<sup>4</sup> P.H. Trans. (Aug. 3, 2007), Cl. Ex. 1 at 7 (Dec. 4, 2006 Notation)(emphasis added).

<sup>5</sup> *Id.*, Cl. Ex. 1 at 6 (Jan. 29, 2007 statement).

be considered related to positioning from that surgery. However, onset many weeks or months later cannot, within a reasonable degree of medical probability, be considered causally related. Despite the reports by Mr. Neeley that his upper extremity symptomatology started shortly after the back surgery, there is no documentation in any of the medical records provided that there were complaints about the upper extremity until some months afterward. Unless such documentation can be provided, it is my opinion within a reasonable degree of medical probability that no causal relationship has been established between the lower back injuries/surgery and the cervical disk protrusion with upper extremity symptoms.<sup>6</sup>

Another preliminary hearing was held on August 3, 2007. Claimant was asking for an order directing respondent to provide the cervical surgery as recommended by Dr. Stein. Claimant also took the position that the causal connection between the underlying accident and the need for cervical surgery had been decided at the earlier preliminary hearing, when the ALJ ordered Dr. Stein to conduct his recommended testing. Respondent continued to dispute the causal connection between the two and pointed to Dr. Stein's most recent report as justification for that position.

The ALJ issued an order granting claimant's request for the cervical surgery and respondent's appeal followed. As a preliminary matter, this member of the Board must first address claimant's contention that there is no jurisdiction over this matter at this juncture of the claim.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to certain jurisdictional issues. Included in the list of appealable issues is whether the injury arose out of and in the course of the employee's employment. Implicit in that issue is the question of whether an injured employee's need for treatment is causally connected to the work-related injury. As claimant acknowledges, there is a difference between the question of whether the treatment is reasonably needed and the question of whether the need for treatment of causally related to the accident.<sup>7</sup>

Contrary to claimant's contention, this Board Member finds that the causal connection between the upper extremity and cervical complaints and the underlying accident has yet to be decided by the ALJ. The first preliminary hearing Order merely directed respondent to provide the recommended testing to determine the source of claimant's complaints. At no time did the ALJ *conclude* that the upper extremity and cervical complaints were the natural and probable result of the original accident. And even if she had, there is no prohibition against multiple preliminary hearings and given the presentation of additional evidence, the ALJ's conclusion as to that issue could change.

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<sup>6</sup> *Id.*, Resp. Ex. 1 at 2 (May 4, 2007 Report).

<sup>7</sup> Claimant's Brief at 2 (filed Aug. 15, 2007).

Thus, this Board Member is not persuaded that the earlier preliminary hearing effectively precluded the ALJ from considering respondent's argument as to the connection between claimant's need for surgery and his original accident, particularly given the additional evidence from Dr. Stein. Res judicata does not apply to preliminary hearings. Accordingly, this Board Member finds that there is jurisdiction to consider this appeal.

Turning now to the actual dispute, this Board Member finds the ALJ's preliminary hearing Order should be affirmed. Distilled to its simplest form, this dispute turns upon claimant's credibility. Dr. Stein's opinion as to the causal connection between claimant's present upper extremity and cervical complaints is wholly dependent on whether the ALJ believed claimant's testimony that his complaints arose just after his surgery. If the complaints emerged within 2 weeks of the surgery, then Dr. Stein indicated that those complaints were more than likely caused by the surgery. If not, then the complaints were unrelated to the surgery and thus, not respondent's responsibility in this claim.

The ALJ apparently concluded claimant was credible because she directed respondent to provide the surgery. And after reading the entire record, as it presently stands, this Board Member finds that the ALJ's preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>8</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated August 7, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2007.

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BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carriers  
Pamela J. Fuller, Administrative Law Judge

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<sup>8</sup> K.S.A. 44-534a.